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IN THE

Supreme Court of the United States

October Term, 1943.

No. 510

Wilson Milling Company, a dissolved corporation, by A. J. Landrum, R. E. Lee Wilson, Jr., J. H. Crain, S. A. Regenold, and W. F. Wilson, Trustees in liquidation, *Petitioner,*

v.

Commissioner of Internal Revenue, *Respondent.*

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Geo. E. H. Goodner,
Washington, D. C.,
Attorney for Petitioner.

Scott P. Crampton,
Washington, D. C.,
Of Counsel.

Press of Byron S. Adams, Washington, D. C.

INDEX.

	Page
Petition for a writ of certiorari	1
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement of the case	2
Specification of errors to be urged	4
Reasons for granting the writ	6
Conclusion	11
Appendix	12

CITATIONS.

CASES:

Borin Corporation v. *Commissioner*, 117 F. 2d 917	7
Commissioner v. *Blaine, Mackay, Lee Co.*, 3 Cir., Nos. 8109, 8110	7
Commissioner v. *Security Flour Mills*, 135 F. 2d 165	6
Eisner v. *Macomber*, 252 U. S. 189	8, 10
Flint v. *Stone Tracy Co.*, 220 U. S. 107	9
Helvering v. *American Dental Co.*, 318 U. S. 322	8
Helvering v. *Cannon Valley Milling Co.*, 129 F. 2d 642	6
Helvering v. *Hormel*, 111 F. 2d 1	11
Helvering v. *A. L. Killian Co.*, 128 F. 2d 433	7
Hirsch v. *Commissioner*, 115 F. 2d 656	7
Hormel v. *Helvering*, 312 U. S. 552	11
Hudson v. *United States*, 12 F. Supp. 620, 13 F. Supp. 640	8-9
Schoellkopf Aniline & Chemical Works v. *United States*, 3 F. Supp. 417	11
Spring City Foundry Co. v. *Commissioner*, 292 U. S. 182	11

Page

United States v. *Butler*, 297 U. S. 1 .....3, 4, 11
United States v. *Hudson*, 299 U. S. 498.....8, 10

STATUTES:

Revenue Act of 1936, c. 690, 49 Stat. 1648:
Section 41 .....6, 13
Section 43 .....6, 14
Section 501(a), (d), (l) 6, 8, 14, 15
Section 503(a) 6, 15

MISCELLANEOUS:

I. T. 2899, Cumulative Bulletin XIV-1, p. 67..... 9
I. T. 3064, Cumulative Bulletin 1937-1, p. 94..... 11
Mim. 4587, Cumulative Bulletin 1937-1, p. 74.....9, 10

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WILSON MILLING COMPANY, a dissolved corporation, by A. J. Landrum, R. E. Lee Wilson, Jr., J. H. Crain, S. A. Regenold, and W. F. Wilson, Trustees in liquidation, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The petitioner, Wilson Milling Company, a dissolved corporation, by A. J. Landrum, R. E. Lee Wilson, Jr., J. H. Crain, S. A. Regenold, and W. F. Wilson, its trustees in liquidation, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled cause on October 18, 1943.

OPINIONS BELOW.

The opinion of The Tax Court of the United States (R. 13-20) is reported at 1 T. C. 389. The opinion of the Circuit Court of Appeals (R. 30-34) has not, as yet, been officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 35). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Is petitioner liable for unjust enrichment tax in 1937 on the sum of $3,794.92 received by it in that year as reimbursements of processing taxes paid by it in 1935 in the purchase of flour (the burden of which tax was shifted to petitioner by its vendors), when petitioner in each of the years 1935, 1936, and 1937 sustained net losses in excess of said amount?

STATUTE INVOLVED.

The statute involved is the Revenue Act of 1936, Sections 41, 43, 501, and 503(a), the pertinent parts of which are printed in the Appendix, *infra*, pp. 13-15.

STATEMENT OF THE CASE.

The Wilson Milling Company, hereinafter referred to as petitioner, was an Arkansas corporation organized in 1930 to engage in the wheat and corn milling business at Wilson, Arkansas. It was dissolved in 1938 and its directors became liquidating trustees to wind up its affairs. Petitioner filed its federal tax returns with the collector for the dis-

trict of Arkansas. (R. 14.) It kept its books and filed its tax returns on the accrual basis of accounting.[1]

In 1934 petitioner discontinued the milling of wheat and thereafter bought flour in the open market from other milling companies and sold it to its customers. It continued the milling of corn into meal, but its business was not successful and it ceased operations in 1937. Its books and records were left in the office in the vacant mill building. The office was later broken into by unknown persons and the books and records were scattered, burned, and destroyed. (R. 14.)

During 1935 petitioner purchased flour from millers under contracts known as "Miller's National Federation Uniform Sales Contract (adopted July 10, 1934)," which contracts contained the following provision:

> Taxes: The price named in this contract includes all taxes as at the date hereof proclaimed by the Secretary of Agriculture by virtue of the authority vested in him by the Agricultural Adjustment Act of the United States. * * * if any tax included in the price hereof shall be decreased or abated, then, in that event, said decrease or abatement shall be deducted from the price hereof. (R. 12-13, 14.)

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[1] At the oral argument before the Circuit Court of Appeals petitioner argued under its fifth assignment of error (R. 23) that the decision of the Tax Court was wrong for the additional reason (not before advanced) that petitioner was on the accrual basis. Therefore, the reimbursements in question, if income at all, accrued in 1936. In that year the provision in petitioner's contracts for tax adjustments (R. 14) ripened into a fixed claim following this Court's decision in *United States* v. *Butler*, 297 U. S. 1. The evidence before the Tax Court showed that petitioner was on the accrual basis, but this particular evidence was not part of the record before the Circuit Court. Petitioner, therefore, asked leave of the Court to have a certified copy of this evidence sent up to be made a part of the record on appeal, and understood that its request was granted. Thereafter, a certified transcript of this particular evidence (set out on pages 12 to 13 of the Appendix) was forwarded to the Clerk of the Circuit Court, but petitioner was advised later that it was not filed. Accordingly, petitioner has attached the evidence to its petition and has assigned error because of the Circuit Court's failure to receive the evidence and consider the question.

On January 6, 1936, the Agricultural Adjustment Act, which imposed the processing taxes, was held invalid. *United States* v. *Butler,* 297 U. S. 1. Thereafter in 1937, and pursuant to the aforesaid agreement, petitioner's vendors refunded to petitioner the sum of $3,794.92. (R. 14.)

Petitioner purchased the flour in 1935 at a certain price per barrel which included the processing tax, as stated in the aforesaid contracts. Petitioner sold the flour at a certain price per barrel and made no separate charge or entry for the tax. Petitioner's cost price in each instance was the price paid under the aforesaid agreements. (R. 15.)

Petitioner sustained losses on the sale of all flour which it purchased and resold (R. 11-12), and it sustained losses on its operations as a whole in each of the years 1935, 1936, and 1937 in the respective amounts of $11,436.81, $4,554.40, and $8,677.06 (R. 15). It reported these losses in its income tax returns filed for said years (R. 15). It filed an unjust enrichment tax return for 1937 and reported therein no unjust enrichment income for 1937 (R. 9, 14).

Although petitioner sustained a net loss of $8,677.06 in 1937 (after including the 1937 reimbursements of $3,794.92), the Commissioner of Internal Revenue determined that petitioner had unjust enrichment income to the extent of the reimbursements, and asserted an unjust enrichment tax thereon of 80 per cent, or $3,035.95 (R. 7-9, 15). The Tax Court affirmed the determination of the Commissioner (R. 13-21) as did the Circuit Court of Appeals (R. 30-35).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court erred as follows:

1. In holding that petitioner had unjust enrichment income when it lost money on its overall handling of the product (flour) from which it received the reimbursements.

2. In holding that petitioner had unjust enrichment income when, in each of the years 1935, 1936, and 1937, it had

losses which exceeded the amount of the reimbursements here involved.

3. In holding that petitioner had unjust enrichment income from reimbursements when the prior deduction (as cost of goods sold) of the amounts refunded did not result in a tax benefit to petitioner.

4. In failing to hold that the reimbursements received by petitioner were either paid under contract and were therefore a reduction in the purchase price, or were not paid under contract and were therefore nontaxable gifts.

5. In failing to allow petitioners to argue a new issue when all the facts necessary for a consideration of the issue were proved in the trial court.

6. In failing to receive and file a certified copy of part of the record in the trial court showing petitioner to have kept its books on the accrual basis of accounting.

7. In failing to hold that petitioner's right to these reimbursements accrued under its contracts in 1936 when the processing tax was invalidated and, if taxable income at all, the reimbursements are taxable income in that year.

8. In failing to hold that the reimbursements received by petitioner in 1937 should relate back to either 1935 or 1936 in order properly to reflect income.

9. In failing to hold Section 501(l) of the Revenue Act of 1936 invalid insofar as it purports to tax reimbursements under Section 501(a) (2) thereof when the taxpayer has no net income.

10. In holding that petitioner realized unjust enrichment income in 1937 from the reimbursements received by it.

REASONS FOR GRANTING THE WRIT.

1. The decision below, holding that amounts paid to petitioner as reimbursements of the processing tax burden previously shifted to it were—

> taxable as income for the year 1937 *regardless of whether the petitioner was on a cash or an accrual basis* (R. 33-34; italics supplied),

is in conflict with *Helvering* v. *Cannon Valley Milling Co.*, 8 Cir., 129 F. 2d 642. That case holds that such refunds relate back to the year of the original transaction under Section 43 of the Revenue Act of 1934 (the pertinent part of which is identical to the same Section of the 1936 Act; Appendix, p. 14).[2]

This Court on October 11, 1943, granted a writ of certiorari in *Commissioner* v. *Security Flour Mills Co.*, 10 Cir., 135 F. 2d 165 (S. Ct. No. 276), to resolve a conflict between that case and the *Cannon Valley Milling Co.* case. Both of these cases deal with the time for deduction by vendors of reimbursements to customers, made after the invalidation of the processing tax. Petitioner herein as a member of the "customer" class has the counterpart of this problem, i. e. the time for inclusion in income (if income) of amounts received as reimbursements from such first processors.

Petitioner in 1935 bought and sold its flour "tax on" under the "Miller's National Federation Uniform Sales Contracts" (R. 14). In 1936 the processing tax was held

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[2] The Appellate Court's holding quoted above also fails to give effect to Section 41 of the Revenue Act of 1936 which is made applicable to unjust enrichment taxes by Section 503(a) of the same Act. Cf. also Section 501 (d) of the Act. (Appendix, pp. 13-15.) Section 41 provides in part that—

> The net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; * * *.

Since the cash receipts and disbursement method of accounting is entirely different from the accrual method of accounting, it is difficult to understand the failure of the Court below to respect this distinction.

to be invalid, and in 1937 petitioner received the reimbursements now in question. A somewhat similar situation is now before the Circuit Court of Appeals for the Third Circuit in *Commissioner* v. *Blaine, Mackay, Lee Co.*, Nos. 8109, 8110, in which cases the Board of Tax Appeals held that attorneys' fees incurred in contesting the processing taxes related back to the year in which such taxes were originally incurred *for purposes of unjust enrichment tax as well as income tax.*[3]

The issue is open on all sides, and this Court should resolve the question not only as to the first processors but also as to their customers.

2. The Court below in discussing the reimbursements wrote as follows:

> It is not important whether the vendors who reimbursed the petitioner in 1937 were legally obligated to do so or not. * * * They [the reimbursements] were obviously, not gifts or returns of capital * * *. (R. 33).

If petitioner's right to these reimbursements could have been enforced under the Miller's National Federation Sales Contract (R. 14), the subsequent readjustment of the purchase price would seem properly to relate back to the date of purchase. If, then, this contract was enforceable, the opinion of the Eighth Circuit is in conflict with its own decision in *Helvering* v. *A. L. Killian Co.*, 128 F. 2d 433, and with decisions of the Sixth and Seventh Circuit Courts of Appeals in *Borin Corporation* v. *Commissioner*, 117 F. 2d 917, and *Hirsch* v. *Commissioner*, 115 F. 2d 656, respectively, holding that a reduction in the purchase price of property does not constitute income, but rather a change in the cost-basis of the property.

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[3] These opinions of the Board of Tax Appeals are not officially reported. They are found in 1942 Prentice-Hall Memo Service, Paragraphs 42,022 and 42,032.

On the other hand, if payment of these reimbursements could not have been required by law, then they must be "the receipt of financial advantages gratuitously". In this posture of the case, the opinion below, in holding these reimbursements were not gifts, is contrary to the recent holding of this Court in *Helvering* v. *American Dental Co.*, 318 U. S. 322.

3. The Court below upheld the constitutionality of Section 501(l) of the unjust enrichment tax law (Appendix p. 15), as applied to a taxpayer having a net loss for the year, by relying upon *United States* v. *Hudson*, 299 U. S. 498. It is submitted that the unjust enrichment tax, when so applied, is violative of the Fifth Amendment and is not sanctioned by the *Hudson* case.

The unjust enrichment tax is unquestionably an income tax. "Income", taxable under the Sixteenth Amendment has, since *Eisner* v. *Macomber*, 252 U. S. 189, 207, been defined as—

> * * * the *gain* derived from capital, from labor, or from both combined, provided it be understood to include *profit* gained through a sale or conversion of capital assets. * * * (Italics added.)

Obviously petitioner herein had no "gain" or "profit" since it lost money in 1935, 1936, and 1937 on all the flour it handled (R. 12) and on its operations as a whole (R. 15). In such a situation Congress indicated that it doubted its right to levy this tax. See the "except" clause of Section 501(l) of the Revenue Act of 1936 (Appendix, p. 15).

Furthermore, it is believed that the English Circuit has misconstrued the scope of the *Hudson* case in applying it to the facts at bar. That case involved a stamp tax (an excise tax imposed under Schedule A of Title VIII of the Revenue Act of 1926, as amended by the Silver Purchase Act of 1934) on the transfer of silver, which fact is apparent from the opinions of the Court of Claims in *Hudson* v.

United States, 12 F. Supp. 620, 13 F. Supp. 640.[4] The question before this Court on appeal of that case was the validity of the retroactive application of this stamp tax. In permitting the tax to be applied retroactively for 35 days this Court said:

> Thus a profit [on the sale of silver] is made the occasion for the tax and also the measure of it. Because of this, counsel for the government contend that the tax is a special income tax; and we think the contention is sound.

Perhaps, at this point the Court had in mind the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, which upheld an excise tax on corporations doing business which tax was measured by net income. While not appearing in the opinions (as the Board admitted; R. 20), it may have been shown that the taxpayer in the cited case had a net taxable income for the year involved,[5] in which event the Court may have

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[4] The Treasury Department treats the stamp tax considered in the *Hudson* case as a "documentary stamp tax". In I. T. 2899, issued in 1935, and still in effect, the tax imposed by the Silver Purchase Act of 1934 was held to be deductible in computing income taxes. In Mim. 4587, Cumulative Bulletin 1937-1, p. 74, the same ruling was expressly adhered to *following* the *Hudson* case. If, however, this tax on silver profits were an income tax, this deduction would not be proper. The Revenue Acts of 1934 and 1936 provide in Section 23 (as the Treasury ruling points out) that in computing net income there shall be allowed as deductions:

> (c) TAXES GENERALLY.—Taxes paid or accrued within the taxable year, *except*—
>
> (1) *Federal income*, war-profits, and excess-profits *taxes* * * * (Italics added.)

Cumulative Bulletin XIV-1, p. 67.

[5] This was admitted in effect on page 4 of Hudson's brief in opposition to the petition for certiorari. Thus Hudson argues:

> * * * in the case of a taxpayer *like the respondent, having a statutory net income of over $100,000*, the tax on the silver profits involved in the present case would total 106% * * * (Italics added.)

United States v. *Hudson*, October Term, 1936, No. 97, Respondent's Brief in Opposition to Petition for Certiorari, filed July 18, 1936.

considered the stamp tax (measured by income) to be analogous to an excess profits income tax. Thus, if the taxpayer had income, Congress could impose an additional tax on it. In the absence of an affirmative showing, however, that the taxpayer in the *Hudson* case operated *at a loss* throughout the taxable year it would appear that the above quotation is *obiter dictum* as the Treasury Department, in effect, so held. Mim. 4587, *supra.* Since the situation in the case at bar (a net operating loss) was not considered by this Court in the *Hudson* case, that decision is hardly authority to support the holding below in the instant proceeding.

In any event the decision of the Circuit Court that Congress may single out a "particular type of income" (R. 34) and impose an *income* tax on it (regardless of the fact that the taxpayer lost money on its entire operations for the year) is so far-reaching as to warrant the consideration of this Honorable Court. If the *Hudson* case means what the Court below construed it to mean, then Congress can constitutionally tax the corner grocer on his gross income without allowing him a deduction for the cost of goods sold and even though he operated at a loss throughout the tax period. It is hardly believable that this Court in the *Hudson* case was overruling *Eisner* v. *Macomber* and other decisions holding that the right of Congress to levy income taxes under the Sixteenth Amendment is limited to cases where there are "gains" or "profits". Petitioner submits that the Sixteenth Amendment does not permit Congress to tax "net losses" under any guise.

4. At the oral argument in the Circuit Court petitioner contended that it was on the accrual basis and thereafter tendered to the Clerk of the Court a certified copy of part of the transcript below (not in the printed record) showing

that petitioner was on the accrual basis of accounting.[6] The Court apparently has not considered this contention and has not filed the additional portion of the record so certified. Such action was contrary to *Hormel* v. *Helvering*, 312 U. S. 552, in which case this Court held that the Eighth Circuit quite properly considered a new issue raised by the Commissioner of Internal Revenue. The issue in that case was advanced for the first time on appeal without an express assignment of error in the petition for review[7] and even though in that case all the evidence necessary for a final decision on the new issue had not been before the Board of Tax Appeals. Here all the material evidence on the issue was before the Board and was tendered to the Circuit Court. In the *Hormel* case this Court refused to sanction such a strict rule of procedure as that applied herein when to do so would result in "a plain miscarriage of justice." A like result is obviously reached by precluding the new issue in the case at bar. Cf. 9 Geo. Wash. Law Rev. 962.

CONCLUSION.

It is respectfully submitted that this Court in considering the *Security Flour Mills* case should also review the instant proceeding so as to settle the comparable questions here involved pertaining to customers of the "first processors."

GEO. E. H. GOODNER,
Munsey Building,
Washington, D. C.,
Attorney for Petitioner.

SCOTT P. CRAMPTON,
Washington, D. C.,
Of Counsel.

November, 1943.

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[6] This fact was very material since, on the accrual basis of accounting, these reimbursements should be taxed, if at all, in 1936 when petitioner's contingent right to demand reimbursement under its contracts (R. 14) became absolute as a result of this Court's holding that the processing tax was invalid in *United States* v. *Butler*, 297 U. S. 1. *The Treasury Department so holds.* I. T. 3064, Cumulative Bulletin 1937-1, p. 94. Only if petitioner was on the cash receipts and disbursements basis would these amounts be taxable in 1937. *Schoellkopf Aniline & Chemical Works* v. *United States*, 77 Ct. Cl. 529, 3 F. Supp. 417; *Spring City Foundry Company* v. *Commissioner*, 292 U. S. 182.

[7] *Helvering* v. *Hormel*, 111 F. 2d 1, 3.

APPENDIX.

Excerpt from Transcript of Testimony.
Hearing at Memphis, Tennessee.
April 23, 1942.

DOCKET NO. 107356.

WILSON MILLING COMPANY, a Dissolved Corporation, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

(MR. GOODNER, Attorney for Petitioner)

Q. On what basis of accounting did the Wilson Milling Company keep books, do you know?

A. Accrual.

Q. These returns, do they show the accrual basis, Exhibits 4, 5, and 6?

A. Let me look at one of them.

Q. I hand you Exhibit No. 4, the 1935 return. State if that is prepared on the accrual basis?

A. There was a beginning inventory and ending inventory there.

Q. When the taxpayer has inventories does that mean it is on the accrual basis, the corporation?

A. Yes, sir.

Q. Is the '36 return prepared on the accrual basis?

A. Yes, sir.

Q. I call your attention to Exhibit No. 6, the 1937 return. In answer to the question "Is this return made on a cash receipts and disbursements basis?" It says, "Yes". Will you explain that answer, if you can?

A. That was just an error in stating that, because you have got a beginning and ending inventory right here on the books.

Q. In '37 did you have any inventory? You testified, I believe, that the Company ceased operations in 1936, didn't you?

A. Yes, sir.

Q. Would it have any inventories?

A. It didn't have any inventories in '37.

Q. And the nature of its operations in 1937 was what?

A. Closing up the business and during that time they received a refund.

Q. Then I will ask you if that return, if you understand accrual and cash receipts, to be on both bases, as far as the 1937 return? Would it be a correct return on either basis?

A. It would be a cash receipt basis.

Q. On the actual receipts basis?

A. On the actual receipts basis, but you can't change the form of filing it.

MR. GOODNER: You may cross examine.

MR. MITCHELL: (Attorney for Respondent) No cross examination.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22(c).)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the dividends paid credit provided in section 27) provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly allowable in respect of such period or a prior period.

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally

collected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

* * * * * * * * *

(d) The net income from reimbursement or refunds specified in subsection (a) (2) or (3) shall be computed as follows: From the total payment or accrual (1) of reimbursement to the taxpayer from vendors for amounts representing Federal excise tax burdens included in prices paid by the taxpayer to such vendors or (2) of refunds or credits to the taxpayer of Federal excise taxes erroneously or illegally collected, there shall be deducted the expenses and fees reasonably incurred in obtaining such reimbursement or refunds.

* * * * * * * * *

(1) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

SEC. 503. ADMINISTRATIVE PROVISIONS.

(a) All provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act, shall, insofar as not inconsistent with this title, be applicable with respect to the taxes imposed by this title, except that the provisions of sections 101, 131, 251, and 252 shall not be applicable.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	10
Appendix	11

CITATIONS

Cases:

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	4
Commissioner v. *Blaine, Mackay, Lee Co.*, now pending in the Third Circuit	6
Helvering v. *Amer. Dental Co.*, 318 U. S. 322	7
Helvering v. *Cannon Valley Milling Co.*, 129 F. 2d 642	5
Helvering v. *A. L. Killian Co.*, 128 F. 2d 433	8
Hirsch v. *Commissioner*, 115 F. 2d 656	8
Johnson v. *Igleheart Bros.*, 95 F. 2d 4, certiorari denied, 304 U. S. 585	6
Kingan & Co. v. *Smith*, 17 F. Supp. 217	9
Louisville Provision Co. v. *Glenn*, 18 F. Supp. 423, dismissed, 90 F. 2d 1012	9
Moundridge Milling Co. v. *Cream of Wheat Corp.*, 105 F. 2d 366	6
North American Oil v. *Burnet*, 286 U. S. 417	7
Rickert Rice Mills v. *Fontenot*, 297 U. S. 110	4
Schoellkopf Aniline & Chemical Works v. *United States*, 77 Ct. Cls. 529	7
Security Flour Mills Co. v. *Commissioner*, No 276, present term	5
Sportwear Hosiery Mills v. *Commissioner*, 129 F. 2d 376	8
Spring City Co. v. *Commissioner*, 292 U. S. 182	7
Union Packing Co. v. *Rogan*, 17 F. Supp. 934	9
United States v. *Butler*, 297 U. S. 1	4
United States v. *Hudson*, 299 U. S. 498	9
White Packing Co. v. *Robertson*, 89 F. 2d 775	9

564154—43

Statutes: Page

Agricultural Adjustment Act of 1935, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 644, 49 Stat. 750 ---- 4

Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 43 ---- 6

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 43 ---- 6

Sec. 501 ---- 4, 5, 11

Sec. 502 ---- 5, 12

Sec. 902 (7 U. S. C. 1940 ed., Sec. 644) ---- 4

Revenue Act of 1938, c. 289, 52 Stat. 447, Sec. 43 ---- 6

Miscellaneous:

I. T. 3064, 1937–1 Cum. Bull. 94 ---- 7

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 510

WILSON MILLING COMPANY, A DISSOLVED CORPORATION, BY A. J. LANDRUM, R. E. LEE WILSON, JR., J. H. CRAIN, S. A. REGENOLD AND W. F. WILSON, TRUSTEES IN LIQUIDATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 13–20) is reported at 1 T. C. 389. The opinion of the Circuit Court of Appeals (R. 30–34) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 18, 1943 (R. 35). The petition for a writ of certiorari was filed on November 26, 1943. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1935 the taxpayer purchased flour at prices which included the processing tax imposed under the Agricultural Adjustment Act and resold the flour at prices which similarly included the tax. In 1937 it received reimbursements from two of its vendors representing amounts of the tax burden which had been passed on to it and which it had in turn passed on. Is the amount of these reimbursements subject, for the year 1937, to the unjust enrichment tax imposed by Section 501 of the Revenue Act of 1936?

STATUTE INVOLVED

The statute involved is set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The taxpayer is an Arkansas corporation, organized on August 7, 1930, to engage in the wheat and corn milling business. It was dissolved on May 2, 1938, and its directors are its trustees in liquidation. (R. 14.)

The taxpayer discontinued the milling of wheat in 1934 and thereafter bought flour on the open market from other milling companies and sold it to retail grocers. During 1937 it received the

amount of $3,794.92 as reimbursements from two of its vendors on flour purchased in 1935. The reimbursements were made with respect to flour delivered under contracts known as "Miller's National Federation Uniform Sales Contract (Adopted July 10, 1934)." (R. 14.) These contracts called for the delivery of a specified number of barrels of flour at a specified price per barrel, and contained a clause reading in part as follows (R. 14):

> Taxes: The price named in this contract includes all taxes as at the date hereof proclaimed by the Secretary of Agriculture by virtue of the authority vested in him by the Agricultural Adjustment Act of the United States. * * * if any tax included in the price hereof shall be decreased or abated, then, in that event, said decrease or abatement shall be deducted from the price hereof.

No separate charge was made by the vendors for processing tax, but the price per barrel was sufficient to include the processing tax on wheat. This flour the taxpayer sold at a specified price per barrel, using as the cost price to determine its sale price, the price paid by it to its vendors. No separate charge was made to its vendees for the processing tax. (R. 15.)

The taxpayer did not receive enough from the sale of its products to cover its cost and expenses of operating. It reported net losses on its income

tax returns for the years 1935, 1936 and 1937 in the respective amounts of $11,436.81, $4,554.40 and $8,677.06. (R. 15.)

The Commissioner determined that the taxpayer was subject, under Title III of the Revenue Act of 1936, to an unjust enrichment tax equal to 80% of the reimbursements (R. 15). The Tax Court affirmed the Commissioner's determination (R. 21) and its decision was in turn affirmed by the Circuit Court of Appeals (R. 35).

ARGUMENT

Introductory.—Titles III and VII of the Revenue Act of 1936 were enacted in response to the decisions in *United States* v. *Butler,* 297 U. S. 1, and *Rickert Rice Mills* v. *Fontenot,* 297 U. S. 110, holding invalid the processing taxes imposed by the Agricultural Adjustment Act of 1935, c. 25, 48 Stat. 31, as amended by the Act of August 24, 1935, c. 641, 49 Stat. 750. Title VII conditioned the refund of processing taxes which had been paid to the Government upon a showing by the claimant that he had not shifted the burden of the tax "directly or indirectly." Section 902 (a). See *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337. Title III was directed at reaching the unjust enrichment resulting from the invalidation of the processing taxes in cases where the taxes had not been paid to the Government, or where, if paid, refunds had already been made. By Section 501 a tax of 80% was levied on the net unjust enrich-

ment or "windfall" income. Clause (1) of Section 501 (a) reached processors who had passed on the burden of the tax but had not remitted to the Government. Clause (2) reached cases, such as the instant one, where a purchaser of a taxed commodity had in turn passed on the burden of the tax and had then received reimbursements from his vendor. Clause (3) reached cases where the processing tax had been paid to the Government, but had been refunded. Section 501 (1) provided that the tax was to be imposed on the net income from these sources regardless of losses from other transactions, and Section 502 avoided double taxation by granting as a credit against the tax the amount of other federal income and excess profits taxes payable on that income. As both the Tax Court and the Circuit Court of Appeals have held, the reimbursements of $3,794.92 which the taxpayer received in 1937 fell squarely within the terms of the statute.

1. There is but a vague relationship between the instant case on the one hand and *Security Flour Mills Co.* v. *Commissioner,* No. 276, present Term, and *Helvering* v. *Cannon Valley Milling Co.,* 129 F. 2d 642 (C. C. A. 8th), on the other hand. In those cases processors made reimbursements to their vendees in years after 1935 and sought to deduct, as business expenses, the amounts of those reimbursements from their incomes for 1935, the year in which they had made the sales

with respect to which the reimbursements were made, rather than from their incomes of the later years. Those cases turn upon a specific statutory provision (Sec. 43 of Title I of the Revenue Acts of 1934,[1] 1936,[2] and 1938[3]), which deals only with the time when deductions and credits shall be taken.[4] The instant case presents no question under Section 43. It does not even present any real issue as to the time when an item of income is to be reported. For even if it should be assumed that the taxpayer was on the accrual basis of accounting, there is nothing in the record to support any suggestion that a right to the reimbursements had accrued at any time prior to 1937. It is not shown and it cannot be assumed that the taxpayer's vendors had agreed prior to that time to make the reimbursements. Processors frequently took the position [in which they were sustained; see *Moundridge Milling Co.* v. *Cream of Wheat Corp.*, 105 F. 2d 366 (C. C. A. 10th); *Johnson* v. *Igleheart Bros.*, 95 F. 2d 4 (C. C. A. 7th), certiorari denied, 304 U. S. 585]

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[1] C. 277, 48 Stat. 680.

[2] C. 690, 49 Stat. 1648.

[3] C. 289, 52 Stat. 447.

[4] *Commissioner* v. *Blaine, Mackay, Lee Co.*, now pending in the Third Circuit, on review of Memorandum Decisions of January 17, 1942, of the Board of Tax Appeals (1942 P-H Memorandum Decisions, pars. 42,022, 42,032), also raises that issue, namely the proper time for deduction of reimbursements to vendees and of attorneys' fees paid in a suit attacking the validity of the processing taxes.

that the tax clause of the Miller's Federation Contract (R. 14) imposed no liability upon them to make such payments. The record does not show that there was here anything more than the usual decision to pay the vendee's claim; nor does it show that any agreement to make the payments was reached prior to 1937.[5] The courts below were therefore plainly correct under long settled principles (see *North American Oil* v. *Burnet*, 286 U. S. 417) in holding that the reimbursements were properly to be reported in that year.[6] Neither *Spring City Co.* v. *Commissioner*, 292 U. S. 182, nor *Schoellkopf Aniline & Chemical Works* v. *United States*, 77 Ct. Cls. 529, nor I. T. 3064, 1937–1 Cum. Bull. 94, is to the contrary. They all hold that an item does not become in-

[5] There is certainly nothing in the case to suggest that the reimbursements were gratuities. Cf. *Helvering* v. *Amer. Dental Co.*, 318 U. S. 322. Petitioner's assertion that the reimbursements were necessarily either gifts or made pursuant to a fixed and definite right under the Miller's Federation Contract is patently fallacious. It cannot be assumed that there was an absence of the usual controversy leading to negotiations resulting in a definite settlement.

[6] Since under any view the reimbursements were income of 1937, it was doubtless for this reason that the Circuit Court found it unnecessary to consider the new issue, tendered there at the eleventh hour, as to whether the taxpayer filed its return for that year on the cash or accrual basis of accounting. Moreover it is to be observed that the evidence relied upon by the taxpayer (Pet. 12–13) to show that the accrual system was used is self-contradictory and hardly supports that conclusion.

come to a taxpayer on the accrual basis until the right thereto has become fixed.

2. There is no merit to the suggestion that the opinion of the Circuit Court is in conflict with its own decision in *Helvering* v. *A. L. Killian Co.*, 128 F. 2d 433; see also *Hirsch* v. *Commissioner*, 115 F. 2d 656 (C. C. A. 7th). Those cases hold simply that where there is a reduction in the purchase price of property before the vendee has finished paying for it, the amount by which the obligation has been reduced does not constitute income to the purchaser, but is only a revision of the original price. Here, however, the goods had already been bought, paid for and resold; the money turned over to the taxpayer by its vendors in the year 1937 could hardly be viewed as other than income in that year. See *Sportwear Hosiery Mills* v. *Commissioner*, 129 F. 2d 376 (C. C. A. 3d).

3. The suggestion that Title III of the Revenue Act of 1936 is unconstitutional ignores more than a quarter of a century of history. The term "net income" taxed by the statutes has never been the net gain or profit of the taxpayer in the economic sense; it has always been simply the difference between "gross income" as statutorily defined, and the deductions as statutorily limited. From the beginning some items which might properly have been included in gross income have been excluded therefrom, and from the beginning the items of

deduction have never attempted nor purported to include all of those which in the economic sense should be subtracted in order to arrive at net gain. It has long been a normal feature of the income tax that a taxpayer might sustain a net loss in the accounting or economic sense, but nevertheless have a net income subject to tax. Familiar and everyday examples are those arising from the limitation upon the allowance of capital losses as deductions. It is clear that there is no constitutional requirement that Congress allow a taxpayer to deduct other losses from his unjust enrichment net income.

The constitutionality of the unjust enrichment tax has been sustained in *White Packing Co.* v. *Robertson,* 89 F. 2d 775 (C. C. A. 4th); *Kingan & Co.* v. *Smith,* 17 F. Supp. 217 (S. D. Ind.); *Louisville Provision Co.* v. *Glenn,* 18 F. Supp. 423 (W. D. Ky.), appeal dismissed, 90 F. 2d 1012 (C. C. A. 6th); and *Union Packing Co.* v. *Rogan,* 17 F. Supp. 934 (S. D. Cal.). And *United States* v. *Hudson,* 299 U. S. 498, seems to have put to rest any question concerning the power of Congress to levy a special tax upon income arising from a particular source.

CONCLUSION

The decision below is plainly correct and is not in conflict with any other decision. There is no occasion for further review and the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
BERNARD CHERTCOFF,
Special Assistants to the Attorney General.

DECEMBER, 1943

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE III—TAX ON UNJUST ENRICHMENT

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally col-

lected with respect to any articles, to the extent that such net income does not exceed the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

* * * * *

(d) The net income from reimbursement or refunds specified in subsection (a) (2) or (3) shall be computed as follows: From the total payment or accrual (1) of reimbursement to the taxpayer from vendors for amounts representing Federal excise tax burdens included in prices paid by the taxpayer to such vendors or (2) of refunds or credits to the taxpayer of Federal excise taxes erroneously or illegally collected, there shall be deducted the expenses and fees reasonably incurred in obtaining such reimbursement or refunds.

* * * * *

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's entire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

SEC. 502. CREDIT FOR OTHER TAXES ON INCOME.

There shall be credited against the total amount of the taxes imposed by this title an amount equivalent to the excess of—

(a) The amount of the other Federal income and excess-profits taxes payable by the taxpayer for the taxable year, over

(b) The amount of the other Federal income and excess-profits taxes which would have been payable by the taxpayer for the taxable year if his net income were decreased by the amount of net income taxable under this title.

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